

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTIN G. HERRERA

Claimant

VS.

TEETER IRRIGATION, INC.

Respondent

AND

CONTINENTAL WESTERN INS. CO.

Insurance Carrier

Docket No. **1,044,558**

ORDER

STATEMENT OF THE CASE

Claimant appealed the July 11, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Christopher J. Shepard of Great Bend, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript with exhibits taken October 10, 2011; the preliminary hearing transcript with exhibits taken September 13, 2010; deposition of Martin G. Herrera taken July 28, 2010; the preliminary hearing transcript with exhibits taken July 9, 2012; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges head, neck, low back and knee injuries which resulted from a February 2, 2009, work-related accident. At a July 9, 2012, preliminary hearing, he sought long-term pain management by a pain specialist. Respondent requested that the ALJ terminate claimant's medical treatment, as Drs. C. Reiff Brown, Paul Stein and Pat Do opined claimant had reached maximum medical improvement.

ALJ Fuller denied claimant's request for pain management by a pain specialist and terminated claimant's pain management. Claimant appeals and argued the ALJ exceeded her jurisdiction by ignoring respondent's obligation under K.S.A. 44-510h to provide medical treatment that is reasonably necessary to cure and relieve the effects of the injury. Respondent asserts the Board does not have jurisdiction to review the ALJ's July 11, 2012, preliminary hearing Order.

1. Does the Board have jurisdiction to review the ALJ's July 11, 2012, preliminary hearing Order?

2. If the Board does have jurisdiction to review this matter, did the ALJ err in denying medical treatment for long-term pain management?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant's job with respondent was to repair irrigation sprinklers. On February 2, 2009, a sprinkler span was being tightened with the use of a tow chain. He testified a coworker "took off before the tow chain was tightened and when he took off that sprinkler span popped up from about 12 feet to 13 feet, I don't know how high it was, and come down and had me pinned me underneath the sprinkler."¹ The sprinkler hit claimant's head, neck and shoulder and knocked him out. When he came to, the sprinkler span was on his neck. Claimant was sore from head to toe, but his pain was greatest in the neck.

After the accident claimant's supervisor told claimant to go home and rest. The next day claimant stayed at home and slept most of the day. On February 4, 2009, claimant called into work because he was not feeling any better and requested medical treatment. Respondent sent claimant for medical treatment to Dr. Plumlee in Ulysses, Kansas. He saw claimant the same day.

At the request of his attorney, Claimant was evaluated on July 13, 2010, by orthopedic physician Dr. C. Reiff Brown and on August 30, 2011, by Dr. George G. Fluter. Their reports indicated claimant was treated by Dr. Plumlee from February 4, 2009, through May 15, 2009; Dr. Alok Shah from July 6, 2009, through September 28, 2009; and Dr. Anwarul Siddiqui, a neurologist, who saw claimant for headaches on June 21, 2011. Dr. Fluter's report dated August 30, 2011, stated that he reviewed medical reports from Dr. Paul Stein including those from a November 24, 2009, independent medical examination. The medical records of Drs. Plumlee, Shah, and Siddiqui were not made part of the record. Only two notes from Dr. Stein dated June 1, 2010, and September 24, 2011, which appear to be progress reports to respondent's insurance carrier, were made an exhibit at the preliminary hearing. In the June 1, 2010, note Dr. Stein indicated claimant had reached maximum medical improvement.

Apparently, after receiving Dr. Stein's June 1, 2010, note that claimant had reached maximum medical improvement, respondent no longer authorized medical treatment for claimant. At the September 13, 2010, preliminary hearing, claimant requested additional

¹ P.H. Trans. (July 9, 2012) at 8.

medical treatment. ALJ Fuller denied the request in a September 15, 2010, preliminary Order because Drs. Brown and Stein opined claimant had reached maximum medical improvement. That Order was not appealed. In July 2011, claimant's current attorney entered his appearance.

At the second preliminary hearing held on October 10, 2011, claimant again requested additional medical treatment. Claimant's attorney introduced the August 30, 2011 report of Dr. Flutter, which contained 12 treatment recommendations for claimant. Respondent countered by arguing that both Drs. Stein and Brown opined claimant had reached maximum medical improvement. In a preliminary Order issued the same day as the preliminary hearing, ALJ Fuller ordered Dr. Pat Do to determine if treatment was necessary and, if so, to state the nature of the necessary treatment. If additional medical treatment was not necessary, then he was to rate claimant.

On November 28, 2011, Dr. Do, who specializes in occupational and sports medicine, examined claimant. He reviewed MRIs of claimant's cervical spine, shoulders and knee, but did not specify which knee. He noted all the MRI's were normal. He stated,

Certainly there are always surgeries that can be done on the shoulders or knees or spine. With this kind of pain picture and this kind of "whole body complaints", I think that any kind of surgery would be unpredictable at helping the patient. I believe him to be at maximal medical improvement under the AMA Guide To Evaluation of Permanent Impairment, 4th Edition.²

Dr. Do then assigned claimant permanent impairments.

A third preliminary hearing was held on July 9, 2012. Claimant sought long term pain management by a pain specialist, and respondent requested that the ALJ terminate claimant's medical treatment. Claimant introduced a letter dated March 21, 2012, from Dr. Scott Appling. Dr. Appling's letter stated claimant needed long-term pain management and he should be seen, evaluated and treated by a pain specialist. Claimant also testified that he had ongoing pain in his head, neck and low back. He was also highly critical of Dr. Do's evaluation. The ALJ's July 11, 2012 Order denied claimant's request for pain management by a pain specialist and terminated claimant's pain management.

PRINCIPLES OF LAW AND ANALYSIS

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. That statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3)

² Dr. Do's IME (Nov. 11, 2011) at 2-3.

whether notice was given or claim timely made; and (4) whether certain defenses apply. The Board also has jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded the judge's jurisdiction. See K.S.A. 2008 Supp. 44-551.

Claimant's attorney argues the ALJ exceeded her jurisdiction by ignoring respondent's obligation under K.S.A. 44-510h to provide medical treatment that is reasonably necessary to cure and relieve the effects of the injury. That argument was raised in order to invoke the jurisdiction of the Board to review a preliminary hearing finding where an ALJ exceeds his or her jurisdiction. However, what claimant is really alleging is that the ALJ erred by finding the medical treatment sought by claimant was not reasonable or necessary, as he has reached maximum medical improvement. K.S.A. 44-534a(a)(2) states, ". . . the administrative law judge may make a preliminary award of medical compensation . . ." An ALJ has the authority to decide issues concerning medical treatment at a preliminary hearing. This Board Member finds the ALJ did not exceed her jurisdiction and, therefore, the Board does not have jurisdiction to review this matter.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.³ Accordingly, claimant's appeal is dismissed, which renders moot the issue of whether the ALJ erred in denying claimant's request for long-term pain management.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of the Board that claimant's appeal of the July 11, 2012 Order by ALJ Fuller should be and is hereby dismissed.

IT IS SO ORDERED.

Dated this ____ day of August, 2012.

THOMAS D. ARNHOLD

³ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2010 Supp. 44-555c(k).

BOARD MEMBER

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